No. 624

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

CLYDE A. PERKINS, *Petitioner,*

vs.

STANDARD OIL COMPANY OF CALIFORNIA, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

EARL W. KINTNER
GEORGE R. KUCIK
STEPHEN S. MAYNE
1815 H Street, N.W.
Washington, D.C. 20006

ROGER TILBURY
1110 Standard Plaza Building
Portland, Oregon 97204

ERNEST BONYHADI
BRUCE M. HALL
1400 Public Service Building
Portland, Oregon 97204
Counsel for Petitioner

Of Counsel:

ARENT, FOX, KINTNER,
PLOTKIN & KAHN
1815 H Street, N.W.
Washington, D.C. 20006

RIVES & SCHWAB
1400 Public Service Building
Portland, Oregon 97204

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Petitioner Clyde A. Perkins was awarded $336,404.57 in actual damages by a jury which found that respondent Standard Oil Company of California had unlawfully injured Perkins, in violation of Section 2 of the Clayton Act, by, *inter alia*, selling to his competitors at discriminatorily lower prices. The district court trebled the award and allowed Perkins $289,000 in lawyers' fees, for a total judgment against Standard of $1,298,213.71. The Ninth Circuit reversed and remanded the case for a new trial. On October 9, 1968, Perkins filed a petition for a writ of certiorari, seeking

review of the court of appeals' judgment and reinstatement of the jury verdict.

(1) In its brief in opposition, Standard repeatedly denigrates its price discriminations in favor of Signal, characterizing them as "small" and "negligible" (Br. in Opp. 3, 11): Those adjectives are, to say the least, hardly a fair description of Standard's rebates to Signal Oil and Gas Company of more than $1 million, a substantial portion of which was directly allocable to Signal's purchases in the Pacific Northwest—the area served by Perkins (see Ex. 23C; Pet. 8 fn. 5).

Beyond this, whether Standard discriminated in price against Perkins and, if so, in what amount, were questions of fact properly submitted to the jury and resolved in favor of petitioner. The jury found that Standard's discriminations had damaged Perkins by more than $330,000, and the Ninth Circuit did not set aside the jury's conclusions in this regard. Standard's resubmission to this Court of arguments rejected by the jury is plainly without merit.[1]

(2) Perkins contends that the court of appeals erred in not upholding the jury verdict on the ground that Standard's discriminations in favor of Signal injured him in his competition with Signal—an example of second line injury which the court mistakenly characterized as fourth line. (Pet. 16, 24). Without any attempt to focus upon and rebut the legal merits of this contention,[2] Standard argues that the issue

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[1] For example, Standard cites Ex. 1550 as authority for the allegation that its price discriminations in favor of Signal amounted to very little per gallon (Br. in Opp. 4 fn. 4). Perkins presented evidence to the contrary (see Ex. 93 I, M, and N), and the jury presumably believed Perkins.

[2] Standard cites no cases in support of the decision of the Ninth Circuit, and that decision runs counter to the cases cited at Pet. 24.

whether petitioner and Signal were competing purchasers never was submitted to the jury (Br. in Opp. 12-13 and fn. 12). That argument simply misstates the facts.

The trial judge charged the jury that Perkins claimed he was injured by having to buy from Standard "at higher prices than the prices charged by Standard to *plaintiff's competitors* with respect to gasoline both on regular and premium grade. The particular *competitors concerned are Signal Oil and Gas Company* and Chevron dealers and Signal dealers . . ." (Tr. 6340-41, emphasis added). Continuing, the judge noted that one of the essential elements of this aspect of Perkins' claim was proof "that Standard sold gasoline to Clyde Perkins at higher prices than the prices charged by Standard on reasonably contemporaneous [*sic*] sales of gasoline of the same type to *competitors*" (Tr. 6347, emphasis added). In a reiteration of the above charge, the words *"of plaintiff"* were added after *"competitors."* (Tr. 6350, emphasis added). Thus, this issue was in fact properly submitted to the jury, and the Ninth Circuit erred in failing to uphold the jury verdict on that ground.[3]

(3) Petitioner also contends that, under the decision in *Van Camp & Sons Co.* v. *American Can Co.*, 278 U.S. 245 (1929), the jury verdict should have been upheld on the ground that the effect of Standard's price discriminations in favor of Signal was "substantially to lessen competition . . . in any line of commerce"—the wholesale and retail marketing of gasoline

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[3] The issue also was preserved in the court of appeals, contrary to Standard's suggestion (Br. in Opp. 13). See, *e.g.*, Index to Brief of Appellee, p. i. ¶ a ("Price differential is conceded in favor of Signal Oil & Gas and Chevron and Signal dealers, all direct competitors of plaintiff.")

in the Pacific Northwest (*e.g.*, Pet. 20-21). Whether Signal and Perkins were competitors is irrelevant to this issue since, whatever Signal's functional level in the market might have been, Standard's discriminations in favor of Signal caused Perkins—the largest independent wholesaler in the area—to be driven out of business. Standard, apparently conceding that this issue was submitted to the jury (see Pet. 17), argues only that it was not raised in the court of appeals. Again, Standard's argument is premised upon a misstatement of the facts.

In his brief in the court of appeals, Perkins argued that Standard's price discriminations, in addition to specifically disadvantaging him as a competitor of Signal, lessened competition throughout the entire Pacific Northwest market, aggravating existing tendencies toward monopolization (Brief for Appellee, pp. 28-31, 38-42). Indeed, as Perkins pointedly observed in the Ninth Circuit, the district judge had noted that the question whether the entire Pacific Northwest market was "upset" by Standard's discriminations was a key issue for the jury to decide (Tr. 3555, quoted at Brief for Appellee, p. 63):

> "If the jury accepts some of the evidence in testimony of the plaintiff, the whole Western market from Olympia to Roseburg was affected . . . . I don't know if they are going to accept it or not, but there is evidence in the case which would warrant that. Now, if they do, that is, the whole marketing area. It is a question for the jury." [Fn. omitted.]

In the same vein, when petitioning for rehearing Perkins argued that the Supreme Court had expressly rejected a functional level limitation on the reach of Section 2 of the original Clayton Act in the *Van*

Camp decision, focusing instead on commercial realities to determine whether competition had been lessened in any realistic market.[4] Thus, contrary to Standard's contention, this issue was properly submitted to the jury and was preserved in the court of appeals. The Ninth Circuit erred in not upholding the jury verdict on that ground.

(4) Finally, brief mention should be made of Standard's suggestion that all of petitioner's contentions may be resolved at the new trial ordered by the Ninth Circuit (Br. in Opp. 11, 12, 13). The jury verdict in favor of Perkins was rendered almost five years ago, and Standard's discriminations occurred between 11 and 13 years ago. While the desire of Standard to

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[4] "As originally written, 2(a) proscribed discrimination where it may 'lessen competition or tend to create a monopoly in any line of commerce.' It had no 'functional level' limitation. The Supreme Court explicitly rejected reading such limitation into § 2(a) in the only case posing that question (*Van Camp* v. *Am. Can Co.*, 278 U.S. 245 (1929)). The Court held it applied to discrimination in both buyer and seller lines, and that:

> 'These facts bring the case within the terms of the statute, unless the words "in any line of commerce" are to be given a narrower meaning than a literal reading of them conveys. The phrase is comprehensive and means that if the forbidden effect or tendency is produced in *one* out of *all* the various lines of commerce, the words "in *any* line of commerce" literally are satisfied (p. 253).

"The line of commerce in which Perkins and SOG [Signal] competed was functionally similar to Van Camp." [Answer of Appellee to Response to Petition for Rehearing, p. 6.]

In denying rehearing the Ninth Circuit expressly stated that the petition "[e]ssentially . . . is *nothing more than a repetition of arguments* concerning assignments, which we are satisfied were all adequately considered and correctly passed upon by our written opinion" (Pet. 2a, emphasis added).

prolong the ultimate resolution of this case is understandable, it is clear that the orderly administration of justice requires that the important questions raised in the petition be resolved at this time, particularly in light of Mr. Perkins' eighty years of age.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

EARL W. KINTNER
GEORGE R. KUCIK
STEPHEN S. MAYNE
1815 H Street, N.W.
Washington, D. C. 20006

ROGER TILBURY
1110 Standard Plaza Building
Portland, Oregon 97204

ERNEST BONYHADI
BRUCE M. HALL
1400 Public Service Building
Portland, Oregon 97204

Counsel for Petitioner

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ARENT, FOX, KINTNER,
PLOTKIN & KAHN
1815 H Street, N.W.
Washington, D. C. 20006

RIVES & SCHWAB
1400 Public Service Building
Portland, Oregon 97204

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